No. 96-1394

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CLASS REPRESENTATIVES GERALD AHEARN, *ET AL.*

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PARTIES TO THE PROCEEDING

The parties to the proceeding are accurately described in the petition except that James Drake and Juanita Drake are not plaintiff class representatives (and, indeed, as far as respondents are aware, were not parties below) and William Mitchell is an additional class representative and a respondent herein.

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INTRODUCTORY STATEMENT

The respondent class representatives adopt and incorporate the statement of the case and the reasons for denying the writ set out in the separate briefs in opposition filed by respondents Continental Casualty Co., Columbia Casualty Co., CNA Casualty Co. of California (collectively, "Continental") and Pacific Indemnity Co. ("Pacific") and by respondent Fibreboard Corporation ("Fibreboard"). We suggest that the Court read those briefs first. This brief addresses those matters that bear particularly on class members' interests in, conduct of and representation in this case.[1]

In seeking review, petitioners present a picture of the settlement at issue that ignores its striking benefit to the class in resolving an otherwise all or nothing insurance coverage dispute, seriously overstates the extent to which the settlement affects class members' ability to control the resolution of their individual personal injury claims, and completely omits any reference to the almost universal acceptance of the settlement by class members and the numerous members of the plaintiffs' bar who handle such claims on a regular basis.

Indeed, most of the legal arguments mounted by petitioners against the settlement are dependent on the false premise that the personal injury claims asserted in the complaint completely define the issues being resolved by the settlement. What petitioners would have the Court ignore is that the primary

1. This brief is being filed on behalf of respondents Gerald J. Ahearn, James R. Dennis, Charles W. Jeep, William J. Mitchell and James Ellison (collectively the "class representatives") in opposition to the petition for certiorari filed on behalf of Esteban Ortiz, *et al.* (cited as "Pet."). Respondents have previously joined in a brief in opposition to the earlier petition for certiorari filed by James Flanagan and David H. Middleton (No. 96-1379) in this case. Citations to the Appendix ("App. __") are to the appendix to the Ortiz petition.

controversy being resolved by the settlement is in fact an insurance coverage dispute between Fibreboard and its insurers in the resolution of which the class members had legal and economic interests in securing a source of recovery for their personal injury claims against Fibreboard which, were Fibreboard to lose the dispute, would otherwise go unpaid.

Regrettably, the petition, like the dissent below, is replete with numerous misstatements of the record concerning the negotiating history and structure of the settlement that, if not corrected, would suggest that the representative plaintiffs and their counsel labored under numerous disabling conflicts of interest and were otherwise inadequate representatives of the class.

REASONS FOR DENYING THE PETITION

A. There Has Been No Miscarriage Of Justice.

Although petitioners make no serious argument that the settlement here is financially unfair to the class, in a variety of ways petitioners insinuate (and the dissent below on which petitioners heavily rely flatly asserts) that the class representatives and their counsel have inadequately represented and otherwise sold out the class in agreeing to this settlement.[2] At various places in the petition, class counsel are alleged to have been "hand-picked" by Fibreboard (Pet. 10) to engage in "a friendly joint venture" with Fibreboard (Pet. Question Presented (3)) to "extinguish" the class members' claims against it (Pet. 7) for a derisory $10 million payment (Pet. 6) in exchange for $43.7 million in attorneys fees (Pet. 8), while simultaneously negotiating generous settlements on behalf of individual clients who were not in the class out of insurance funds that could otherwise have gone to the class (Pet. 8-9).

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2. *See, e.g.*, Pet. 10; App. 65a-69a.

The inferences that petitioners would have this Court draw from their misleading and selective presentation of the record are that, to use Judge Smith's words, a "miscarriage of justice" (App. 70a) has occurred which this Court should rectify. Nothing could be further from the truth.[3]

Asbestos-related personal injury cases have been brought in increasing numbers against Fibreboard and others since at least 1967 (App. 218a-219a). By the mid-1980's, both the factual and legal bases for Fibreboard's liability to persons injured by exposure to its asbestos-containing products was well-established (App. 219a). By 1987, asbestos-related cases were being filed against Fibreboard at the rate of 13,000 to 17,000 cases a year (App. 231a).

Since 1979, Fibreboard has also been engaged in litigation with Continental and Pacific over two insurance policies alleged to provide it with $500,000 per claim coverage — with no aggregate limits on the number of claims covered — for all asbestos-related personal injury claims brought against it by persons exposed at any time prior to March 15, 1959, to any asbestos-containing product manufactured, distributed or sold by Fibreboard (App. 232a-234a). Although that litigation (the "Coverage Case"), which was consolidated with similar cases between other asbestos manufacturers and their insurers, had resulted in favorable trial court rulings in favor of Fibreboard

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3. The record in this case is extensive, although one would not know it from reading either the petition or Judge Smith's dissenting opinion. And contrary to Judge Smith's justification (App. 107a) for his substitution of his views of the competence and integrity of class counsel for those of the district court which heard all the evidence presented at an eight-day evidentiary hearing (which was preceded by massive discovery taken by petitioners), there were factual disputes in this case and the district court's resolution of them is subject to review for clear error, not appellate *de novo* review. Rule 52(a), Fed. R. Civ. P.; *Anderson v. City of Bessemer*, 470 U.S. 564, 573-76 (1985).

by 1990 (App. 232a-235a), Continental and Pacific had taken appeals (App. 236a).

By late 1988, as a result of the exhaustion of all but $100 million of available insurance (except for the disputed Continental and Pacific policies), Fibreboard had inadequate cash to defend and pay its ever-mounting asbestos liabilities (App. 243a). Using its remaining funds, Fibreboard undertook, successfully, to negotiate a structured settlement program ("SSP") with members of the plaintiffs' bar, principally Steven Kazan and Harry Wartnick (who had for many years been Fibreboard's principal West Coast adversaries). The SSP program paid a portion of each settlement in cash but payment of most of the settlement amount was made contingent on the outcome of the Coverage Case (App. 243a-245a, 356a).

However, by early 1991 even the SSP program was no longer possible and Fibreboard began negotiating "assignment settlements" under which it paid no cash but, to the extent of the settlement amount, assigned its rights under its disputed Continental policy to the plaintiff (App. 251a-252a). Continental objected to this procedure and extensive litigation among it, Fibreboard and plaintiffs ensued (App. 252a-257a).[4]

It was in this context that the initial discussions that ultimately led to the settlement at issue here began. In late 1990 or early 1991, representatives of Fibreboard contacted a partner in the Ness Motley law firm (which by that time was involved in virtually all major trials against Fibreboard) and Messrs. Kazan and Wartnick about the possibility of negotiating a global assignment settlement of Fibreboard's present and future

4. During this period, Fibreboard and Pacific reached a conditional $360 million settlement of their dispute of which $225 million was contingent upon their obtaining a judgment cutting off any contribution rights Continental might have against Pacific (App. 248a-251a).

personal injury asbestos-liabilities (App. 259a-260a). During 1991, Joseph Rice of Ness Motley, Steven Kazan and Harry Wartnick, and two partners of Caplin & Drysdale whom they retained to assist in the negotiations (collectively "plaintiffs' counsel"),[5] proceeded to obtain and evaluate extensive information, including expert epidemiological and investment banking advice, about Fibreboard, its assets and its existing and future asbestos liabilities, as well as about developments in the Coverage Case (App. 260a-264a).

Based on that information, protracted negotiations took place during 1991 looking towards a Rule 23(b)(3) opt-out class action global assignment settlement covering both present and future claims. These negotiations were terminated in December 1991 because of the parties' inability to agree on mutually acceptable terms and attempts to revive them in 1992 failed (App. 266a-267a). At no time was Continental a party to those negotiations, although it was kept informed of them (App. 267a) as were members of the asbestos plaintiffs bar (App. 265a).

Following the failure of the global assignment settlement negotiations, the Ness Motley firm and Fibreboard negotiated an assignment settlement agreement covering roughly 20,000 existing clients of that firm and its affiliates which was executed in December of 1992 (App. 268a-269a). Upon the conclusion of that agreement, by January of 1993, Fibreboard had settlement agreements in place involving debt to present asbestos claimants exceeding $1.2 billion (*id.*), more than five times its total value excluding asbestos liabilities (App. 343a).

In early 1993, Fibreboard sued Continental in the Eastern District of Texas, seeking a declaration that the Ness Motley assignment settlement agreement it had just made was binding

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5. Another Ness Motley partner, Joseph B. Cox, Jr., became involved in the negotiations in May 1992 as one of plaintiffs' counsel.

on Continental in the event Fibreboard prevailed in the Coverage Case and an order barring Continental from asserting any contribution rights against Pacific (App. 269a-270a). The case was assigned to then District Judge (now Circuit Judge) Robert M. Parker. As that litigation proceeded, settlement negotiations took place that resulted in the signing of an agreement on April 9, 1993 (the "April 9 Agreement") between Continental and Fibreboard pursuant to which, *inter alia*, the parties mutually agreed to seek a global settlement of all Fibreboard's present and future asbestos-related personal injury liabilities, to be funded entirely by insurance, in return for which Fibreboard would cease making assignment settlements (App. 274a-276a). Following the April 9 Agreement, Continental promptly filed suit in the Eastern District of Texas against Fibreboard and Pacific seeking, in effect, to invalidate Fibreboard's prior settlement with Pacific. This case was also assigned to Judge Parker and was consolidated with the litigation between Continental and Fibreboard over the Ness Motley agreement (App. 276a-277a).

At the end of April 1993, plaintiffs' counsel met with counsel for Continental and Fibreboard to discuss a possible global settlement. Continental's offer of $2 billion (payable over 25 years without interest)[6] to resolve all of Fibreboard's unliquidated present claims and all future asbestos claims was summarily rejected by plaintiffs' counsel (App. 277a-278a). Thereafter, negotiations took place among Ness Motley, Continental and Fibreboard concerning the group assignment settlement then being litigated before Judge Parker (App. 278a-279a). At the same time unsuccessful negotiations took place between Fibreboard and Continental concerning a possible settlement of their insurance coverage dispute (App. 279a-280a).

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6. Depending on the discount rate used, as plaintiffs' counsel could easily recognize, the present value of this offer was at least $1 billion less than its face amount.

Between approximately May 1, 1993, and August 9, 1993, no meaningful negotiation for a global class settlement occurred. Instead, representatives of Fibreboard, Continental and Ness Motley devoted their efforts, at the recommendation of Circuit Judge Patrick E. Higginbotham who was serving as a mediator, to resolving the litigation over the Ness Motley assignment settlement, which they finally accomplished in early August 1993 through execution of a revised Ness Motley agreement covering 45,000 then pending cases (App. 278a-285a).

Following Judge Parker's approval of the settlement of the Fibreboard/Continental litigation involving the Ness Motley assignment settlement in August 9, 1993, the parties, joined for the first time by Pacific in mid-August, negotiated towards a possible global settlement covering both the remaining unsettled present claims and all future claims against Fibreboard (App. 285a-292a). During this period, a significant impetus toward reaching an agreement was created by the parties' knowledge that a decision by the California Court of Appeal on the Coverage Case appeal by the insurers was imminent (App. 294a, 296a). After plaintiffs' counsel concluded that a settlement including present claims was impractical, an agreement in principle on a $1.535 billion cash, futures-only, global settlement was reached on August 27, 1993, and announced in open court (App. 292a-298a).

One significant term of the August 27, 1993 agreement in principle was a provision plaintiffs' counsel insisted upon, requiring a "back-up" settlement between Fibreboard and the two insurers of the Coverage Case that would become operative only if for any reason the global settlement were not approved (App. 295a-296a). Negotiation of that $2 billion back-up agreement,[7] known as the Trilateral Agreement, took over six

7. As the record makes clear, the $2 billion represents nothing more than the sum of the $1.525 billion which the insurers had agreed to pay the (Cont'd)

weeks (App. 298a-301a), and an additional ten weeks was required to reach the actual global settlement agreement (App. 301a-302a).

Meanwhile, on September 9, 1993, plaintiffs filed the complaint in this action against Fibreboard (App. 300a) and Continental and Pacific filed motions to intervene the same day (App. 543a-546a). The parties jointly moved for provisional certification of the plaintiff class in the action (which was granted) (App. 515a-518a, 547a-551a) and Fibreboard and the insurers sought and received a temporary restraining order against the filing of additional claims by members of the provisionally certified class against them (App. 300a). Thereafter, the court extended the temporary restraining order and, following a hearing, entered a preliminary injunction (App. 300 n. 22).

Following execution of the global settlement agreement, a massive dissemination of the notice of the proposed settlement took place in the latter part of 1994 (App. 419a-430a). Objections to the proposed settlement on behalf of class members have been pressed only by the five petitioners herein and the two petitioners in No. 96-1379 (App. 202a, 404a, 430a).

After completion of the dissemination of notice, the district court permitted petitioners to intervene and allowed them to conduct extensive discovery (App. 18a). The district court then held an eight-day hearing at which petitioners were afforded an

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(Cont'd)

futures class in the global settlement and $475 million which was the insurers' estimate of their obligation to resolve those existing cases not yet settled either under the revised Ness Motley agreement or by other Fibreboard/insurer settlements reached with plaintiffs during the summer of 1993 (App. 295a-296a, 298a-299a, 320a-321a).

unrestricted opportunity to question the representatives and expert witnesses of the settling parties (including plaintiffs' counsel) concerning all matters relevant to the fairness of the proposed settlement (*id.*). No petitioner has raised any claim that he was afforded either insufficient discovery or inadequate participation in the settlement approval proceedings. Following the hearing, the district court approved the proposed settlement, entering extensive findings of fact (App. 209a-435a), conclusions of law (App. 436a-479a), and a memorandum opinion (App. 149a-208a).

As the district court found, given the very real risk that Fibreboard would lose the Coverage Case[8] — with the attendant result that Fibreboard's $235 million net worth would be dwarfed by the over $1.2 billion of unfunded settlements with non-class members for which it was already liable — a settlement under which that significant risk was eliminated for the class by providing $1.535 billion in cash payable to a trust for the benefit of the class is clearly and overwhelmingly a great benefit to the class. While there can be no assurance that $1.535 billion will be sufficient to pay the claims of all class members in full, the evidence of record shows that that amount, subject to the distribution procedures of a trust established for the benefit of all the class members, is more likely than not adequate to compensate the claims of all class members at fair and appropriate values and the district court so found (App. 322a-327a).[9]

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8. Uncontroverted expert testimony at the settlement approval hearing, credited by the district court, demonstrated the correctness of the negotiating parties' views that the risk was substantial (App. 237a-242a, 323a-324a). No contrary evidence was proffered by petitioners or anyone else.

9. No contrary evidence was proffered by petitioners or anyone else at the settlement approval hearing.

Notwithstanding petitioners' innuendoes (Pet. 10) and Judge Smith's intemperate assertions that the class members "suffer dramatically" (App. 78a) and are "the only losers" (App. 66a) from the settlement, they point to nothing in the record of this case that would furnish any basis for the Court to conclude that the district court and the Fifth Circuit panel majority erred in finding that the $1.535 billion settlement of this coverage dispute was eminently fair, reasonable and adequate from the perspective of the class (App. 63a-64a, 207a). Instead, petitioners (and the dissent below) would carve the settlement into pieces and contend that it is unfair for Fibreboard to settle its liability to the class for only $10 million of its own funds (Pet. 6; App. 65a, 84a-85a). This contention, however, is based upon the wholly erroneous premise articulated by Judge Smith that the settlement "is really two agreements: one between Fibreboard and the insurers to settle their policy disputes for $1.525 billion, and another between the futures class and Fibreboard to limit the class's recovery to insurance proceeds plus $10 million of Fibreboard's $225-250 million net worth" (App. 84a).

Such a view can only be based on the false proposition that, absent a settlement with the class, Fibreboard and the insurers would (and indeed did) settle their insurance disputes among themselves (Pet. 3 n.1, 4). It ignores the fact, as demonstrated by the record, that despite repeated efforts to do so, Fibreboard and the insurers could not settle the Coverage Case independently (App. 246a-257a, 267a-268a, 279a-280a). If Fibreboard prevailed in the Coverage Case it would have virtually unlimited insurance and would not be faced with insolvency. It would not settle for an amount which left its solvency threatened and Continental would not pay an amount which, in effect, conceded the Coverage Case. The *only reason* Fibreboard agreed to the Trilateral Agreement (which did leave it exposed to the risk that continued litigation with individual class members would eventually exhaust the $1.525 billion

included to cover those claims and ultimately bankrupt Fibreboard) was that plaintiffs' counsel made such a back-up agreement a condition precedent to their entering into the global settlement agreement (App. 295a-296a, 298a-299a) which, if approved, would preserve Fibreboard's equity.

Moreover, under the April 9 Agreement Continental had agreed with Fibreboard that any global settlement with plaintiffs would be entirely funded out of insurance proceeds (App. 275a-276a). Thus, as a practical matter, plaintiffs could not compel Fibreboard to agree to any class settlement that would come out of its own coffers because Fibreboard could simply turn to Continental for the funds. Of course, from plaintiffs' perspective, as long as they received a fair amount in settlement they were indifferent as to who paid it.

Finally, the notion that class members traded away Fibreboard's liability "for nothing to which they did not already have a right" (Pet. 10; App. 65a), to the extent the point is comprehensible at all, appears to assume that the class members already had the right to Fibreboard's insurance from Continental and Pacific in some specific amount — but, of course, the Coverage Case was all about whether such insurance was zero or some greater, and possibly open-ended, amount. And it was the Coverage Case dispute, to which the class members were, as a practical matter, indispensable parties, that was resolved initially by the agreement in principle to a global settlement.[10]

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10. The indispensability of the class members to resolution of the Coverage Case is demonstrated by the companion *Rudd* case — a fact assiduously overlooked by petitioners and Judge Smith. A condition to the Trilateral settlement was the bringing of a declaratory relief action against the very class that is the plaintiff class in this case for a determination that they are bound by that settlement. Although that action (the *Rudd* case) was brought against a non-opt-out futures class, and the class representatives consented to the entry of the judgment sought therein, neither petitioners nor

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If the point is that the Trilateral settlement gave the class a "right" to the insurance proceeds, it is equally wrong. The record below conclusively demonstrates that the class will receive hundreds of millions of dollars less out of the Trilateral settlement (even including Fibreboard's entire net worth in the calculation) because (i) in an effort to drive case values down far enough to save its net worth, Fibreboard will be forced to spend hundreds of millions of dollars in defense costs litigating individual class member claims and (ii) class members will also pay tens of millions of dollars of additional attorneys fees to their counsel for handling their claims against Fibreboard in the tort system in excess of the 25 percent cap on fees for representation before the settlement trust imposed by the global settlement agreement (App. 327a-331a).

Indeed, it is this dramatic difference in the net dollars that will ultimately be received by class members, in the event this global settlement is rejected by the courts and they are left to litigate with Fibreboard in the tort system, that makes petitioners' and Judge Smith's assertions that the class is being victimized by this settlement ring so hollow. It is one thing for petitioners to seek to convince this Court that application of their views of legal rules governing class action settlements should preclude this settlement from being finally approved. However, petitioners' corollary proposition — which they ask this Court to grant certiorari to endorse — that it would be an affirmative benefit to the class as a whole to allow Mr. Ortiz and his co-petitioners to win the race to judgment, and thereby contribute to the exhaustion of the insurance proceeds available to pay the later-maturing claims of other class members, is preposterous.

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Judge Smith raised any of the jurisdictional or Rule 23 objections to *Rudd* they assert against this settlement. Indeed, petitioners filed an amicus brief in support of affirmance of *Rudd* in the Fifth Circuit and Judge Smith joined that portion of the panel majority's opinion affirming *Rudd* (App. 75a).

B. No Serious Question Is Raised About Adequacy Of Representation.

Both as part of their innuendoes about the unfairness of this settlement to the class and their explicit assertions of inadequate representation of the class under Rule 23(a)(4) of the Federal Rules of Civil Procedure, petitioners cast a variety of unfounded aspersions upon the conduct of plaintiff's counsel in negotiating this settlement. All are belied by the record and, even if they were open to dispute, are factual questions inappropriate for review by this Court.

To set the stage, petitioners (supported by Judge Smith) initially seek to impugn plaintiffs' counsel's independence by asserting that they were "hand-picked" by Fibreboard to negotiate this settlement (Pet. 10; App. 68a, 70a). The inference they seek the Court to draw is, of course, that Fibreboard sought out members of the plaintiffs' bar who were either beholden to it or otherwise believed to be likely to be less than vigorous negotiators on behalf of the class.

As shown by the record, although it is true that Fibreboard initiated class settlement discussions in 1991 with Messrs. Kazan, Wartnick, Rice and Motley (later replaced by Mr. Cox), their selection simply was a recognition of the fact that those lawyers were Fibreboard's principal adversaries in the tort system at that time and, in the case of Messrs Kazan and Wartnick, had been so for years (App. 259a-260a, 355a-356a). Indeed, the Ness Motley firm was involved at that time in roughly 50% of all asbestos claims in the United States and in virtually all major trials involving Fibreboard, while Messrs. Kazan and Wartnick were generally considered by the asbestos plaintiffs' bar to be the lawyers most knowledgeable about Fibreboard (*id.*). Thus, both Fibreboard and Continental chose to negotiate a

global settlement with plaintiffs' counsel because they realized that those lawyers would be accepted by the plaintiffs' asbestos bar as the most aggressive and knowledgeable representatives of claimants' interests (App. 356a).[11]

Next, petitioners (and Judge Smith) contend that plaintiffs' counsel labored under a disabling conflict of interest because (i) they represented a competing group of non-class plaintiffs at the same time they negotiated this settlement for the class and (ii) they settled those individual claims for higher-than-average amounts, contingent upon a global settlement (Pet. 8, 14; App. 76a-77a, 107a-109a). These contentions are both factually and legally wrong.

First, since asbestos personal injury claimants are not adversaries, the only possible conflict among them would arise if they were competing for limited resources. Petitioners seek to suggest such a conflict here (Pet. 14), but, given the open-ended nature of the disputed insurance coverage, the district court correctly concluded that there was in fact no such competition between the so-called "present" claimants and the "futures" class (App. 363a, 367a) and the panel majority agreed (App. 34a). Moreover, despite some insinuation to the contrary by Judge Smith (App. 68a, 76a), there is no evidence whatsoever in the record to support the proposition that plaintiffs' counsel "sold out" the interests of the class in return for better settlements

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11. Inconsistently with their complaint that Fibreboard hand-picked plaintiffs' counsel, petitioners also complain that Judge Parker purported to "authorize" and "appoint" plaintiffs' counsel in early August of 1993 to negotiate this settlement (Pet. 4). Given that such counsel had already been negotiating global issues with Fibreboard off and on for over two years and that any such appointment or authorization by Judge Parker gave them no legal capacity they did not already possess, respondents are at a loss to know what impropriety petitioners are claiming before this Court.

for the present individual clients and the district court expressly found to the contrary (App. 374a-375a).[12]

Second, the suggestion that the term in the revised Ness Motley agreement providing that the second 50 percent of the payments due thereunder would be conditioned on, *inter alia*, a global settlement of all Fibreboard's asbestos personal injury liabilities created "huge financial interests" (Pet. 14) for plaintiffs' counsel to negotiate a settlement for the class "on *any terms*" (App. 108a) is also incorrect. To begin with, Messrs. Kazan and Wartnick were not involved in the Ness Motley settlement and Caplin & Drysdale did not and do not represent any individual asbestos personal injury plaintiffs at all. Moreover, the district court expressly found, based on expert testimony, that on the facts here, the so-called back-end-payment contingency did not create an impermissible conflict of interest even for the Ness Motley firm (App. 372a-373a). The panel majority reached the same conclusion (App. 33a-34a). There is no reason for this Court to review the extensive district court

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12. Indeed the district court found that the revised Ness Motley settlement was actually used by plaintiffs' counsel to leverage *up* the claim values used in arriving at the global settlement (App. 374a) and the panel majority concurred (App. 32a). Judge Smith, by contrast, relies entirely on his personal views (based on law review articles written by others) of the Ness Motley firm's conduct in negotiating the *Georgine* settlement (at issue in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, No. 96-270 (argued February 18, 1997)) in suggesting that similar conduct occurred here (App. 76a, 110a). Not only is the *Georgine* settlement wholly unrelated to this one, but the allegations concerning the Ness Motley firm's conduct are controverted by the district court findings in that case and were hotly disputed (but never decided) on appeal. Moreover, none of the other plaintiffs' counsel in this case were even involved in the *Georgine* settlement much less alleged to have engaged in any similar conduct there and Mr. Kazan is one of the principal antagonists of Ness Motley in *Georgine* (including representing the Cargile respondents in *Amchem*).

fact findings on which it and the court of appeals based their respective determinations that no disabling conflict of interest for plaintiffs' counsel was present in this case.

C. No Serious Question Is Raised About Class Member Conflicts.

Petitioners also claim, as they allege in *Amchem*, that the class was "plagued by an inherent, structural intra-class conflict between presently injured and exposure-only class members" (Pet. 14). Once again this position, articulated more fully by the dissent below (App. 110a-114a), is long on rhetoric and short on (indeed controverted by) facts of record.

First, as Judge Smith acknowledges, this asserted conflict arose out of the trust distribution provisions of the global settlement which governed how the settlement funds would be paid over time to class members and did not exist with respect to the negotiations over the total settlement amount (App. 114a). Thus, at most, the issue presented is whether there should have been separately represented subclasses during the subsequent negotiation of the trust distribution procedures and not whether the settlement as a whole is flawed.

Second, the supposed conflict here, according to Judge Smith, is that the class members with "extant claims" would oppose any limits on their recoveries from the settlement trust (being indifferent to its ultimate depletion), while those with "latent claims" would seek "damage caps" to ensure that the trust would not run out of funds by the time their claims became extant (App. 111a).

While superficially plausible, this argument entirely ignores the basic premise on which this non-opt-out class settlement is based — absent a unitary settlement of the Coverage Case the

entire class runs the risk of going uncompensated for both their extant and latent injuries. Any unitary settlement for less than a guaranteed 100 percent payment of all recoverable present and future damages of class members — and all settlements are by their nature compromises from full recoveries — requires equitable apportionment of the settlement fund among the class members. Judge Smith's point thus proves too much because, if accepted, every Rule 23(b)(1)(B) action would require the creation of subclasses (and attendant separate counsel, at least following the initial agreement on the settlement amount) for each category of class member who could arguably claim entitlement to some form of different treatment from any other category of class member.

Moreover, Judge Smith wholly fails to explain how a court would identify the multiplicity of conflicting interests requiring subclassing, how a court would select counsel for those subclasses in the middle of ongoing settlement negotiations and how any disputes among the subclass representatives would be resolved short of litigation in the event of a negotiating impasse among them.

In this case, although no subclasses were created, four of the class representatives had extant claims for either malignant diseases (plaintiff Jeep had mesothelioma and plaintiff Ellison had lung cancer) or non-malignant diseases (plaintiffs Ahearn and Dennis had asbestosis), while only one plaintiff, Mitchell, alleged exposure to asbestos-containing products manufactured by Fibreboard but had not manifested any asbestos-related disease (App. 348a-349a, 351a). The class representatives with extant claims were aware that the restrictions imposed by the various spendthrift provisions of the settlement trust — no punitive damages, a $500,000 cap on compensatory damages, possible delays in payment with priority given to claimants with cancer — would limit their and other class members' recoveries

in order to ensure that all class members were treated fairly and they agreed with that result (App. 350a-351a). Similarly, plaintiffs' counsel historically represented large numbers of asbestos personal injury plaintiffs and they likewise concurred that the spendthrift provisions of the trust, including notably the 25 percent cap on attorneys fees on amounts recovered from the trust, were fair to all class members (App. 386a).

Strikingly, notwithstanding all the rhetoric about conflicting interests, the only conflicts that petitioners and Judge Smith point to between the "extant" and "latent" claimants are those provisions of the trust distribution process that are designed to prevent extant claimants from depleting the settlement trust's assets to the detriment of the latent claimants. This is, however, exactly the type of "conflict" at which application of Rule 23(b)(1)(B) to provide for equitable allocation of limited resources is aimed.

Based on the facts, on competing expert testimony and on the extent to which the two proposed subclasses' interests in this unitary settlement coincide rather than diverge, the district court concluded that separate subclass representation was neither legally nor ethically required (App. 386a-389a) and the panel majority concurred (App. 35a-37a). Notwithstanding Judge Smith's contrary views (which are largely unsupported by the record[13]), these factbound issues do not warrant review by this Court.[14]

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13. Indeed most of Judge Smith's dissent on this point, as elsewhere, is based on his view of the facts in *Amchem* and not on the record of this case (App. 112a-113a).

14. Although prudently not expressly raised by petitioners, Judge Smith also asserts a conflict between "pre-1959" and "post-1959" class members (App. 114a-116a). In a particularly telling rebuttal to his assertion that the

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D. The Claims Settled Here Were Real And Could Have Been Litigated By The Class.

Many of the legal arguments advanced by petitioners are based on their contention that this settlement is based on a " 'case' brought by plaintiffs who do not in good faith plead claims they intend to litigate, and which is brought as a friendly joint venture with the defendants" (Pet. Question Presented (3)).

Thus, petitioners claim that the Fifth Circuit majority erred in holding that the Rule 23(a) requirements of commonality and typicality were met by "ignor[ing] class members' actual legal claims and instead wholly rely[ing] on the settlement" (Pet. 11). The claims referred to are, according to petitioners, "individual, *in personam* personal injury claims *against Fibreboard*" contained in a complaint which "was no more than a contrivance to ripen prematurely claims that will exist, if at all, only at some unknown time in the future" — "a charade" (Pet. 16).

Based on the foregoing characterization of the case, petitioners argue, in addition, that (i) because the claims in the complaint could not be certified as a class action without the defendant's consent, plaintiffs had no leverage against the defendant in the settlement negotiations (Pet. 12), (ii) the claims of the class representatives are not typical because "the class is

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conflict issues he raises involve "[n]o factual dispute[s]" and thus appellate review should be *de novo* (App. 107a), Judge Smith's analysis of this alleged conflict is flatly erroneous in, among other things, asserting that "[t]he global settlement . . . eliminated the privileged status of pre-1959 claimants" (App. 115a) when, as the record demonstrates, that distinction (based on available insurance coverage) was eliminated by both the April 9 Agreement and the Trilateral Agreement, both of which *preceded* the negotiations of the trust distribution provisions of the global settlement agreement (App. 37a, 383a-384a).

'a hodgepodge of factually as well as legally different plaintiffs' " (Pet. 14), and (iii) class members cannot make meaningful decisions about whether to object to the settlement because their asbestos-related injury claims are unaccrued and thus unknown (Pet. 15).

Implicitly recognizing that the settlement here did resolve the class's claims against Fibreboard's insurers, petitioners assert that (i) those claims involved only a dispute between Fibreboard and the insurers (in which the class is aligned with Fibreboard) and (ii) the class could not have litigated any such claims against the insurers (Pet. 16-17). The very history of this dispute and its resolution demonstrates how wrong the petitioners are.

When the plaintiffs filed their complaint in 1993, the law of the Fifth Circuit, embodied in decisions such as *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. 1981), appeared to require the district court to review the class settlement achieved here primarily on the basis of the fairness of the settlement itself to the absent class members, and the complaint simply served as a vehicle to bring the settlement before the Court for review and approval as required by Rule 23(e) of the Federal Rules of Civil Procedure. Almost two years after plaintiffs filed their complaint, and following completion of the settlement approval hearings, the Third Circuit decided *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), which was followed shortly by its decision in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, No. 96-270 (argued February 18, 1997). Petitioners read those cases to stand for the proposition that a class cannot be certified under Rule 23 if it asserts claims that cannot be litigated to judgment in the absence of a settlement. Anticipating a favorable decision by this Court in *Amchem*, the petitioners argue that the class here was improperly certified

because the complaint that commenced this action similarly asserted no claim that could have been litigated in the absence of a settlement.

This approach stands the issues discussed in *General Motors* and *Amchem* on their heads. The question is not whether the parties have settled the issues they pleaded but, rather, whether they could have litigated the issues they settled.

Had *General Motors* been decided before the plaintiffs filed their complaint, and were it then the law in the Fifth Circuit, the plaintiff class would have filed a different complaint to invoke the District Court's jurisdiction to consider this settlement and, if necessary, to litigate the very claims that the class in fact settled here.

Had they been required by this Court's as yet unrendered decision in *Amchem* to do so, the plaintiffs could have pleaded claims — for declarations that Fibreboard was entitled to its disputed insurance proceeds, and if necessary, that the Trilateral settlement was not binding upon the plaintiffs — capable of being litigated to judgment in the absence of this settlement, and that were in fact settled by this settlement. Although the class complaint did not specify these claims for relief, the issues that underlie these claims were in fact the focus of the proceedings below, and they were fully litigated by petitioners and the other parties at the fairness hearings.

The plaintiffs here had a strong and unitary interest in the outcome of the coverage dispute; that interest was pleaded in their complaint, *see* Complaint ¶¶ 11-24 (App. 532a-535a); and they had standing to litigate that interest under California law,[15]

15. California law, which would govern under Texas conflicts of law rules, *Duncan v. Cessna Aircraft Co.*, 665 S.W. 2d 414, 421 (Tex. 1984), (Cont'd)

as well as under the Declaratory Judgment Act, 28 U.S.C. § 2201.[16] And, indeed, they could properly litigate that interest in a Rule 23(b)(1)(B) class action since the piecemeal prosecution of separate actions by individual class members over the coverage issues would as a practical matter be dispositive of the interests of the remaining class members — the very predicate of a Rule 23(b)(1)(B) action. Moreover, as a suit seeking declaratory relief, such an action could also have proceeded as a mandatory, non-opt-out class action under Rule 23(b)(2).[17]

Of course, such a declaratory judgment action could have been settled among the plaintiffs, Fibreboard and Continental as was done in this settlement.

Had Fibreboard settled the coverage dispute with Continental without the plaintiffs' participation or consent, in a manner unsatisfactory to the plaintiffs, the plaintiffs could have brought suit for a declaration that the settlement was not binding

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permits third-party plaintiffs to obtain declaratory relief against a defendant's insurer before judgment on a coverage question to determine the existence and scope of coverage. *See Omaha Indem. Co. v. Superior Court*, 258 Cal. Rptr. 66 (Cal. App. 1989); *General Ins. Co. of America v. Whitmore*, 45 Cal. Rptr. 556 (Cal. App. 1965). *See also Horace Mann, Ins. Co. v. Barbara B.*, 846 P.2d 792, 795 (Cal. 1993).

16. *See Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1332-33 (11th Cir. 1989); *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (10th Cir. 1978).

17. That rule provides for mandatory class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

on them, and that the settling parties were not entitled to a judgment that would bind the plaintiffs to a settlement that would impair their rights against those parties, where the settlement did not provide sufficient proceeds or adequate provisions to ensure all of them a full recovery. Indeed, such a declaratory judgment action would lie to anticipate the suit that would inevitably be brought (and, indeed, was brought in *Rudd*) against the class by Fibreboard's insurers to obtain the Settlement Agreement Approval Judgment required by the Trilateral settlement (App. 60a-63a). *See Superior Oil Corp. v. Pioneer Corp.*, 706 F.2d 603, 607 (5th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984).

And, again, such a case could be litigated as a Rule 23(b)(1)(B) class action. As the district court found at the fairness hearing, the Trilateral settlement would have liquidated the disputed insurance coverage for an amount that, even combined with Fibreboard's equity, would not have sufficed to ensure that all class members, left to assert their claims individually in the tort system, would receive a full recovery from Fibreboard (App. 324a-325a). Thus, the risk remained that piecemeal litigation would exhaust the Trilateral settlement proceeds and Fibreboard's other assets, and would as a practical matter be dispositive of the interests of the remaining, uncompensated class members. That risk would justify the litigation of the claim under Rule 23(b)(1)(B). And, again, as a suit seeking declaratory relief, it could also have proceeded as a mandatory class action under Rule 23(b)(2) and could have been settled.

Thus, if this Court were to decide *Amchem* as petitioners hope, in determining whether to grant review in this case (or vacate and remand to the Fifth Circuit) plaintiffs suggest that the only issue before the Court would be whether or not to deem the pleadings amended to conform to the evidence adduced at the fairness hearings, pursuant to Rule 15(b) of the Federal Rules

of Civil Procedure,[18] hardly meriting review. Moreover, as this Court has before it a complete record on which to render its decision, there is no reason to remand the case to the court of appeals or the district court simply to conform the complaint's allegations to the claims actually litigated in the fairness hearings.[19]

Finally, as for petitioners' contention that "meaningful notice" could not be given to the class (Pet. 15), the class members who received notice of the proposed settlement simply had to decide whether their interests would be better served by this settlement or by either rolling the dice on the Coverage

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18. Appellate courts permit pleading amendments on appeal where necessary to affirm a trial court judgment. *See* 6A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d § 1494 (1990). Indeed, courts of appeal have deemed pleadings "constructively amended" to conform them to the proof and decision below without requiring a formal motion to amend from the plaintiff. *See, e.g., Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 388-89 (5th Cir. 1984); *City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 201-02 (5th Cir. 1965).

19. *See* 28 U.S.C. §§ 2106, 2111; *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984).

Petitioners' reliance (Pet. 17) on *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), is misplaced. Unlike here, where the matters actually litigated in the fairness hearings encompassed the insurance coverage issues described in both the complaint and the notice to the class, the settlement in *Super Spuds* purported to settle and release certain claims not held by the class representatives, not alleged in the complaint and nowhere adverted to in the class notice. *See* 660 F.2d at 17-19 and n. 7. And to the extent petitioners read the decision more broadly to hold that a class action settlement cannot release claims that were not specifically presented to the trial court for adjudication, such a reading is inconsistent with this Court's decision in *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996).

Case or taking hundreds of millions of dollars less in the Trilateral settlement. That choice is straightforward and, contrary to petitioners' arguments, wholly unaffected by the fact that the asbestos-related personal injury claims of most class members are as yet unaccrued.[20]

CONCLUSION

Motivated by their expressed desire that petitioner Ortiz be entitled to obtain and collect a judgment "*in its entirety*" without interference by any other class members (Pet. 23), petitioners have tied up this $1.535 billion settlement on appeal for over two years asserting a combination of factual misrepresentations about the record and inapposite legal arguments ostensibly made on behalf of those class members — the "exposure-only" claimants — whose very interests petitioners seek to impair for their own benefit. The thousands of members of the class whose asbestos-related personal injuries caused by exposure to Fibreboard products have become manifest over the last four years should not be required to wait further to obtain compensation for their injuries. This Court should deny the petition.

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20. Since normally no class member can predict whether he or she would even be affected by the settlement's spendthrift limitations and since the potential impact of those limitations on any given class member is dwarfed by the magnitude of the choice between securing $1.535 billion versus either nothing at all or several hundred million dollars less in the aggregate, any class member can certainly "meaningfully assess *today* whether the settlement will be in his best interests at such future time as an asbestos-related injury may occur" (Pet. 15). Moreover, if the class had to wait until all injuries had manifested, the Coverage Case would have decided the issue. Clearly, the class was not required by the rules of procedure to roll the substantive dice.

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